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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1095

RICHARD B. MENSEN,
Petitioner,

vs.

BALTIMORE & OHIO RAILROAD COMPANY,
a Corporation,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

Mensen v. Baltimore & O. R. R. Co., 111 Ill. App. 2d 362, 250 N. E. 2d 303 (1969), **leave to appeal denied** by Illinois Supreme Court.

QUESTION PRESENTED FOR REVIEW

In a suit brought under the Federal Employer's Liability Act the Appellate Court for the Fifth District of Illinois found that a truck provided by respondent for use by petitioner, its employee, slipped and fell from the jack placed by petitioner who was changing a tire. The falling of the truck from the jack caused petitioner's alleged injury.

Petitioner's only theory of the case and the only issue submitted to the jury was that petitioner would not have had to change the tire "but for" a defective tube.

The **sole** question presented for review is:

Was the Illinois Court correct in refusing to establish a "but for" rule of causation?

STATEMENT OF THE CASE

Petitioner was employed by respondent railroad as a signal maintainer. The following facts were found by the Illinois Court and appear in the opinion below:

> Plaintiff's [petitioner's] duties required him to test flasher lights and signals in an assigned area and do whatever was necessary to maintain them in working order. He regularly used a truck provided by defendant, was in charge of its maintenance, and could use a credit card to buy gasoline, oil and filters. If tires were needed he was required to contact his supervisor who would issue a requisition for their purchase.
>
> . . . On the morning of February 3, 1965, he had a flat tire. This involved the right rear tire which had previously gone flat, and had been repaired on

> January 30. **He stopped, jacked up the truck and while he was removing the tire, the tire hit the fender of the truck, the truck slipped off the jack and plaintiff was pushed backwards.** (Emphasis added.)

In petitioner's suit for damages under the F. E. L. A. the only negligence with which respondent was charged was "in permitting a defective inner tube to remain on the truck. . . ." Petitioner did not contend nor was the jury charged that respondent was negligent with respect to the truck falling from the jack, the event responsible for petitioner's injury.

In ruling that there was no causation between the charged negligence and petitioner's injury, the Illinois court stated:

> ". . . The performance of his duties required plaintiff to maintain the truck, including the changing of tires. It is not contended that defendant failed to furnish him with the tools necessary to change the tire, and the most the evidence shows is that he may have been required to perform the particular task more often than if the tires were perfect, or that **'but for' defendant's negligence plaintiff would not have been injured."** (Emphasis added.)

REASONS FOR DENYING THE WRIT

The Appellate Court decided the causation issue with strict adherence to the F. E. L. A. decisions of this Honorable Court. Contrary to the inference attempted by petitioner, the Appellate Court considered, understood, and cited the cases of **Gallick v. Baltimore & O. R. R. Co.**, 372 U. S. 108, 83 Sup. Ct. 659 (1962), and **Rogers v. Missouri Pac. R. R. Co.**, 352 U. S. 500, 77 Sup. Ct. 443 (1956). The Illinois court stated that those cases contained

". . . the most recent comprehensive expressions of the Supreme Court with respect to the determination of **negligence and causation**. . . ." (Emphasis added.) **Mensen v. Baltimore & O. R. R. Co.**, 111 Ill. App. 2d 362, 250 N. E. 2d 303, 304 (1969).

No case cited by petitioner (nor any case of which we are aware) lend support to a "but for" theory of causation. The case of **Gallick v. Baltimore & O. R. R. Co.**, 372 U. S. 108, 83 Sup. Ct. 659 (1962), upon which petitioner most heavily relies, concerns the **sufficiency** of proof of negligence and is not based upon a "but for" theory of causation since there was evidence to support the causation issue in that case. Id. at 113-117.

The Illinois court followed unanimous case law in refusing to establish a "but for" rule as a substitute for facts establishing causation.

In **Nicholson v. Erie R. R. Co.**, 253 F. 2d 939 (2d Cir. 1958), cited by the Illinois court, the employee charged that the railroad failed to afford her toilet facilities at the shops where she worked and, consequently, she was required to use the toilet facilities in a passenger car standing on tracks near the shops. While using the facilities on the car, the employee was injured. Similar to the case at bar, the railroad was not charged with any negligence with respect to the actual contact with the plaintiff which caused the injury. In holding that there was an absence of causal connection, the court stated:

> "It is not enough . . . that the injury would not had happened 'but for' the negligence." Id. at 491.

The opinion below also cited **Dessi v. Penn. R. R. Co.**, 251 Fed. 2d 149 (3rd Cir., 1958), cert. denied 356 U. S. 967; **Simpson v. Texas & New Orleans R. R.**, 297 F. 2d 660 (5th Cir. 1962).

CONCLUSION

The judgment is not in conflict with any reported decision. There are no "special and important reasons" for this Court to assert jurisdiction. The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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